

REMARKS

Claims 1, 4, and 15-19 are pending the present application. By this Response claims 1, 15, 16, 17, 18, and 19 are amended. New claims 20 and 21 are added. Care has been exercised to avoid the introduction of new matter.

A Notice of Allowance issued for this case on April 14, 2003 after agreement was reached with Examiner Ware and Quality Assurance Examiner Dudash. Subsequently, the subject case was withdrawn from issue and an Office Action issued on July 1, 2003, approximately three weeks after the Notice of Withdrawal was issued. For the sake of clarity, the Examiner's language is reproduced as follows:

Examiner's Position

Claims 1 and 4 are rejected under 35 USC Section 101 because the claimed invention is directed to non-statutory subject matter. The claimed product occurs naturally and products of nature are not patentable. It is the position of the Examiner that a product consisting of urine obtained from two female white-tailed deer in estrus has not been modified from that which occurs in nature. It is noted that Applicant states in the 37 CFR 1.132 Declaration filed 10/04/2002 that female deer, including

those in estrus, travel in relatively large groups of 3 and most often more. Applicant further declares that the use of the same scrape by two does in estrus does not occur in nature due to a large number of factors pertaining to the mating habits of animals in the deer family and that this knowledge is considered common among those dealing extensively and having expertise with the deer family. However, in the 37 CFR 1.32 Declaration filed by Applicant July 11, 2001, Applicant states "that during the observation period, five does were observed to adopt buck-like behavior in that they pawed the mock scrape bated with the 'Doc's Double Doe,' and urinated further on it" when referring to the test performed to determine effectiveness of the claimed formulation. This appears to contradict Applicant's statements that two does in estrus do not use the same scrape in nature. Further, the prior art (U.S. 4,773,177 and U.S. 4,667,430) appear to recognize that multiple female deer co-inhabit within an area and that the scrapes are made in trails heavily used by female deer. Accordingly, Applicant's previous statements that the use of the

same scrape by two does in estrus does not occur in nature is not found persuasive.

For the sake of clarity, the Examiner's reasoning for rejection under 35 USC Section 103 is also reproduced as follows:

Claims 15-19 stand rejected under 35 USC Section 103(a) as being unpatentable over Collora et al. (5,896,692; hereinafter '692), or Bell (5,672,342; hereafter '342). '692 teaches a process for obtaining a scent lure for animals such as white-tailed deer, comprising animal urine wherein the urine is collected from more than one animal in estrus (abstract; C2,L1-30; claims). The urine collected is from animals in estrus or animals in rut, and is collected using a urine-gathering stall. '692 does not teach limiting the collection of urine to two animals nor does it teach each of the specific steps as claimed.

The '342 Patent also teaches a process for obtaining a scent lure for deer when the urine is collected from one female deer in estrus with a urine-gathering stall. It is submitted that an animal scent attractant wherein the urine is obtained from one animal would not attract an animal differently from one wherein the urine is obtained from two different animals. Stated

differently, absent a demonstration of criticality, it is submitted that urine collected from two animals is not critical over urine collected from one animal. It is also noted that the '342 also does not teach limiting the collection of urine to two animals, nor does it teach each of the specific steps as claimed.

The Examiner concludes his reasoning as follows:

The steps not specifically set forth in either '692 or '342 do not appear to be critical in view of the 37 CFR 1.32 Declaration filed by the Applicant July 11, 2001. Therein, Applicant declares that multiple deer, including female deer, urinate further on the scrape treated with the formulation obtained according to the instant process. Such a scrape is no longer limited to containing urine from two female deer in estrus and assessment of whether the deer are approaching the scrape on the basis of treatment with urine from two female deer in estrus cannot be determined since the scrape contains urine from additional deer.

Arguments

The Examiner's position is respectfully traversed on ground that the Affidavits under 37 CFR 1.132 disclose the criticality of the claimed

formulation, so that the recited formulation is not obvious. Further, the recited formulation is not found naturally, but is selectively gathered by isolation.

It is respectfully submitted that the Examiner's refusal to accept the statements of the Affidavits submitted under 37 CFR 1.132 is based upon a misreading of the subject Affidavits. The Examiner appears to be relying upon observed aberrations rather than the majority findings (90% – 92% preference for the claimed formulation) test results specified in those Affidavits. This misreading of the Affidavits also appears to support the Examiner's position under Section 101.

Comments made in the Office Action dated July 1, 2003 necessitate a clarification of the present invention for the benefit of the Examiner. The present invention is a lure for white tail bucks, and works most effectively when they are in rut. The lure is only one active component: the urine of only two does in estrus. These ingredients are isolated and collected through a special process that ensures that the urine from additional does in estrus is not mixed in. It is this particular formulation that is tested (as indicated by the Affidavits under 37 CFR 1.132) and determined to have far better results than any other formulation (90% - 92% preference of observed animals). The operative component recited in claim 1 can be diluted, mixed with

preservatives or other fillers. These do not enhance the capabilities of the operative component or degrade it (except when substantially diluted).

While two does in estrus are found in nature, finding a spot where the urine from only two does is virtually impossible. As indicated previously, and in the Affidavits, deer tend to congregate in groups of three or more so that there will almost always be more than two does in estrus at any one time. Consequently, the formulation of the present invention can only be made by artificial means, including the recited process by which the urine is gathered. The isolation of the urine of two does is a key attribute and a key reason that the operative ingredient of the present invention is not one that occurs in nature. It is simply too difficult to bring about. Despite being unnatural in nature, the claim formulation has a 90% –92% success rate with bucks (the target of the present invention), results that are not matched with formulations containing urine from a single doe in estrus, or formulations containing three or more does in estrus (both naturally occurring formulations). The observed success of the present invention is attributed to the fact that something in the psychology of a buck in rut prefers two does in heat as compared to three or more, or a single doe in estrus.

The Affidavits clearly point to a majority test finding of 90% - 92% preference, by bucks for the claimed formulation. Since the test results were

reported honestly in Affidavits, 10% – 8% non-preference by the bucks observed was also recorded. Such an aberration can be based upon simple statistical variants, competition between the bucks themselves, or other external and unknown factors, such as sensing a predator or the like. The minority test results could be construed not as being equal to the majority test results but as being aberrations from which no conclusions should logically be drawn. This also includes some of the observed behavior on the part of does, which is also considered aberrant behavior since the vast majority of the does observed remained quite calm when sensing the formulation of the present invention.

The Examiner refers to the Affidavits under 37 CFR 1.132, submitted by Dennis W. Malloy, Jr. as supporting what the Examiner construes to be a contradiction between the Affidavits. The Examiner is referring to the language “that during the observation period, five does were observed to adopt buck-like behavior in that they pawed the mock scrape bated with the ‘Doc’s Double Doe,’ and urinated further on it”. Apparently, the Examiner is construing this language to mean that two does in estrus will create a scrape in nature using only their own urine. This is a complete misreading of the language of the Affidavits.

Firstly, there is nothing in this language that implies the existence of a scrape in nature using urine of only two does in estrus. Rather, it is stated elsewhere in the Affidavits that this formulation never occurs in nature. This language refers to only the fact that a small minority of the deer observed exhibited strange (“buck-like”) behavior in response to the claimed formulation. The next sentence of the same Affidavit states that the majority of does appeared to be comfortable in the vicinity of the test site baited with the claimed formulation. Also, in the Declaration by Keith Ainsley, it was stated that many of the does coming in contact with the scrapes baited with the claimed formulation exhibited calm behavior. Clearly, the “buck-like” behavior of five does constitutes a statistical aberration which in no ways contradicts the conclusions supporting the overwhelming effectiveness (92%) and thus criticality of the claimed formulation.

In effect, the Examiner has relied upon an observed aberration constituting a small minority of the data to evaluate the teachings of the Affidavits. By doing this the Examiner ignores the majority conclusions of the Affidavits Under 37 CFR 1.132. This is an incorrect contradicted and interpretation of the Affidavits, leading the Examiner into speculation to contradict the clear statements by experts in this field.

The Examiner has suggested that the destruction of scrapes by the aberrant behavior (buck-like behavior) of an observed minority meant that the scrapes were no longer proper test examples. In this, the Examiner is correct. Once scrapes were contaminated with other fluids, they were no longer used in observation. This is common sense for any series of testing. Unfortunately the Examiner has apparently speculated that contaminated test sites were used once it they had been compromised. As such this would render the tests for the recited formulation invalid. This is, of course, not true. Contaminated sites were abandoned and new sets of lures placed elsewhere for fresh observation.

New claims 20 and 21 are submitted reciting that the urine from two does in estrus are isolated and gathered to provide the operative component of the claimed white tailed buck lure. This is not a natural occurrence since isolation and gathering do not take place in nature. Rather, the deer are placed in special isolated pens for urine gathering. Only two deer use the same pen during the entire estrus season. Isolation of the deer's urine is strictly maintained in order to provide the recited operative component. This is something that is entirely unnatural, and could not be affected without the artificial expedients of capturing and isolating the does, and allowing them to urinate only in a particular location.

While the limitation of claims 20 and 21 are not believed necessary for patentability, these limitations are added to emphasize the unnatural characteristic of the recited formulation. However, just to obtain the formulation as recited in claim 1 requires the unnatural process recited in claim 17.

All other amendments have been added to better maintain internal consistency of the claim language, and should not be construed as further limiting the claims in any manner.

CONCLUSION

Based upon the aforementioned comments, it is respectfully submitted that all claims are now in condition for allowance. Favorable reconsideration is respectfully requested.

Should the Examiner have any questions, comments, or suggestions, or should issues remain, the Examiner is respectfully requested to contact the undersigned by telephone for prompt and satisfactory resolution.

Because of the difficulties encountered throughout the prosecution of the subject application, the undersigned respectfully request a formal interview with the Examiner and any other party necessary to authorize a Notice of Allowance for the subject application, including, but not limited to the Supervisory Patent Examiner and the Group Director. The undersigned can be reached by telephone, and expects to hear from the Examiner to schedule the necessary formal interview.

Respectfully submitted,



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